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Report of the International Criminal Court

Letter dated 21 February 2012 from the Chargé d'affaires a.i. of the Permanent Mission of Liechtenstein to the United Nations addressed to the Secretary-General

I have the honour to transmit to you the report of a retreat on the future of the International Criminal Court, held in Triesenberg, Liechtenstein, from 16 to 18 October 2011 (see annex). The meeting was organized by the Government of Liechtenstein with the support of the Liechtenstein Institute on Self-Determination at Princeton University.

I would be grateful if the present letter and its annex could be issued as a document of the sixty-sixth session of the General Assembly, under agenda item 75.

(*Signed*) Stefan **Barriga**
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Annex to the letter dated 21 February 2012 from the Chargé d'affaires a.i. of the Permanent Mission of Liechtenstein to the United Nations addressed to the Secretary-General

Retreat on the future of the International Criminal Court, Liechtenstein, 16-18 October 2011

Summary

From 16 to 18 October 2011, a group of three dozen senior policymakers (see attached list) participated in a retreat on the future of the International Criminal Court organized in Triesenberg, Liechtenstein, by the Government of Liechtenstein with the support of the Liechtenstein Institute on Self-Determination at Princeton University. The participants at the retreat, which was held under Chatham House rules, considered the major political challenges to be faced by the Court and the Assembly of States Parties in the coming years: main challenges for the Assembly; implementation of the Rome Statute and cooperation with the Court's requests; role of the Court in the international system; and promoting the universality of the Rome Statute.

The informal and interactive discussion resulted in a list of proposed action points that would require consideration and follow-up by the actors identified therein.

Challenges for the Assembly of States Parties

The following were the main points raised in the discussion on the future challenges for the Assembly of States Parties:

- The Rome Statute remains one of the most important achievements in international law to date. The Court has become a major global institution within a relatively short time. Both the Assembly and the Court have embraced cooperation with civil society (e.g. work on universality).
- The fact that some major powers will for the foreseeable future remain outside the Rome Statute system continues to pose great challenges, as does the uneven support for the Court in Africa.
- The nature of the Assembly is changing, in particular as only a few delegates remain who participated in the Rome Conference. The Assembly should continue as a value-inspired community and not only focus on budgetary matters. The Presidency of the Assembly should remain as proactive as possible. Bureau members should become more active, including at the ambassadorial level.
- After Kampala, the main challenge is to get the relationship between the Assembly and the Court right, in accordance with article 112 of the Rome Statute. Both judicial independence and administrative accountability are necessary and should not be challenged. A thorough legal analysis is required to apply this distinction in practice.
- Currently, there is no clear budget policy in place. This needs to be remedied once the current budget discussions are over. The budget can either be demand-driven or resource-driven, but not both at the same time. Due regard

should be paid to the issues raised by the Committee on Budget and Finance in this regard (e.g. regarding legal aid and outreach). International justice is one of the least expensive and most effective aspects of the international community's response to violent conflict. The Court has seen a tremendous increase in activities, which could be rendered even more efficient by simplifying the Rules of Procedure and Evidence. A biennial budget could also help in this regard, and furthermore provide the Assembly with an opportunity to focus on policy issues in off-budget years. The Court should focus on its core functions and do a better job of managing expectations, as it cannot be responsible for all impunity problems in the world.

- The question of costs arising from Security Council referrals needs to be tackled, despite the difficulties involved. Ultimately, this issue needs to be decided by the General Assembly of the United Nations, which is the competent organ for budget matters under the Charter of the United Nations.

- The Assembly of States Parties has an important role in ensuring efficient proceedings. This requires an open discussion with the Court. The Court could be invited to provide statistical information on the work of its main organs, including judges. Performance standards for use of time and resources would not undermine judicial independence. Due process and witness protection can be time-consuming; but lengthy proceedings also affect the rights of the accused and are a serious reputational concern.

- The Assembly must ensure the highest quality of Court officials and Assembly mandate holders. The Search Committee process for the next Prosecutor has been very professional and widely appreciated. The Assembly should think of procedures that will allow it to find the best possible judges, bearing in mind that the moment of nomination is decisive in this regard. Judges should have extensive experience in the courtroom.

- The efforts to provide the Court with diplomatic support, in particular outside the formal Assembly context, are not sufficiently coordinated. At the general debate of the sixty-sixth session of the General Assembly of the United Nations, an initiative was started for a ministerial-level network which should be further developed.

Suggested actions for States parties:

1. Think creatively about diplomatic and political support activities outside the framework of the Assembly, given its limitations in this respect. Create mechanisms to enhance and coordinate diplomatic support for the Court outside of the formal Assembly context, e.g. through the creation of a network at ministerial level.

2. Improve the dialogue between the Assembly and the Court, either by making better use of the Study Group on Governance or by creating an additional platform.

3. Continue improving the relationship between the Assembly and the Court and achieve the right balance between judicial independence and administrative accountability, including by conducting a proper legal analysis of the issues involved and taking into account the Court's unique nature.

4. Improve understanding of the Court and its mandate among States, including among actors who do not primarily deal with the Court's issues (e.g. Security Council delegates), and among other stakeholders.

5. Devise a strategic budget policy, looking beyond the immediate needs and outside the context of negotiating a specific annual budget. This includes a discussion of policy issues (including in the light of earlier Assembly decisions, e.g. on legal aid, reparations, outreach), practical measures to improve the budget process (such as a possible switch to a two-year budget) and discussion of the costs arising from Security Council referrals.

6. Strengthen the support given to the President of the Assembly by the Bureau by ensuring active engagement of the Bureau members; consider electing the entire Bureau at such a moment that it presides over each Assembly session it prepares.

7. Analyse the lessons learned from the Search Committee process for the next Prosecutor and apply them in the future.

8. Consider new ways of encouraging the nomination of the best possible candidates for the election of judges, including by learning lessons from the Independent Panel for Nominations of the Coalition for the International Criminal Court. Review Rome Statute criteria such as list A/B and the "qualifications required ... for appointment to the highest judicial offices".

9. Explore incentives for domestic judges to consider an international career, including the offer of "training courses" to prepare them for work in an international judicial body.

10. Make better use of the omnibus resolution as a tool for political support for the Court, including by streamlining and restructuring the text.

11. Consider reviewing the cumbersome rules for the recruitment of staff and the secondment of gratis personnel with a view to promoting the hiring of the best professionals.

12. Reconsider the number, length and timing of the sessions of the Assembly, as well as their content (e.g. thematic discussions, inviting high-level representatives or relevant United Nations officials, etc.).

13. Consider procedures to allow for intersessional decision-making of the Assembly in exceptional and urgent situations, given the limited number of the Assembly's sessions per year.

Suggested actions for the Court and States parties:

14. Continue and deepen the dialogue on ensuring efficient proceedings while protecting essential procedural balances (currently held in the context of the Study Group on Governance). This should lead to improvements through practical measures on implementation, but could also lead to changes to the Rules of Procedure and Evidence or, likely at a later stage, even the Rome Statute. Proposals for such changes should be elaborated with input from the Court itself (possibly in collaboration with contracted experts), while not necessarily as a result of a consensus within the Court itself.

15. Work to promote better relations with the African Union, including by continuing to pursue the establishment of a liaison office in Addis Ababa.

16. Improve the exchange of information between New York and The Hague, by both Court officials and among delegates; provide training for delegates.

17. Consider creating new training opportunities for potential new judges and Court officials as well as Government officials and staff of relevant organizations dealing with the Court's matters (e.g. by encouraging renowned universities and research institutions to establish an "academy" for continuing education in international criminal justice).

Suggested actions for the Court:

18. Ensure that the provisions of the Rome Statute, the Rules of Procedure and Evidence and other applicable laws are applied consistently by different chambers and other organs of the Court.

19. Conduct a lessons-learned exercise once the first trial has reached completion.

20. Take steps to improve States parties' confidence that the Court is diligently handling decisions with cost implications and work to enhance transparency in this respect.

21. Encourage continuing professional development for all officials, including senior and elected officials, e.g. through organized "legal studies" or similar peer-based mechanisms, possibly in coordination with the suggested "academy" (see para. 17 above).

Implementation and cooperation

The following were the main points raised in the discussion on the implementation of the Rome Statute and cooperation with the Court:

- Implementation of the Rome Statute through domestic legislation and cooperation with the Court are closely interlinked. Fewer than half of States parties have domestic legislation regarding cooperation, and only a few more have incorporated the definition of crimes into their criminal codes. Domestic legislation can depoliticize cooperation, in particular execution of arrest warrants, by involving the judicial branch.

- The importance of cooperation cannot be overstated. Cooperation affects crucial aspects of the Court's proceedings (witness protection, transfer of accused, arrest and surrender, etc.). Overall, States parties respond quite well to judicial cooperation requests by the Court, and in some instances, States parties have shown exemplary cooperation in the execution of some arrest warrants (e.g. Belgium in the case of Jean-Pierre Bemba).

- At the same time, the continuing lack of cooperation regarding some other arrest warrants (e.g. Omer Al-Bashir) undermines the credibility of the Court. The guidelines of the Office of the Prosecutor on arrest could help States parties in devising and implementing appropriate policies regarding essential and non-essential contacts with fugitives sought by the Court.

- While the Court has been repeatedly requested to report on cooperation, States parties — to whom most of the recommendations of resolution ASP/6/Res.2 are directed — have not. The Assembly of States Parties does not yet pay sufficient concrete attention to these issues.

- Cooperation comprises both judicial cooperation (through requests by the Court) as well as diplomatic and political cooperation. The latter poses particular challenges, as the Court operates during ongoing conflicts and therefore tension may arise with other political objectives. States parties need to manage this tension better, as inconsistent support for the Court damages its legitimacy and credibility. Such diplomatic and political support must be pursued outside the Assembly of States Parties as well, including in informal settings and within other organizations.

- Cooperation should also be sought beyond the circle of States parties. Members of the Security Council should have an interest in the effectiveness of the Council's referrals. States not parties share the commitment to fighting impunity, at least in principle, and could therefore contribute as well, in particular when pressured by civil society.

- Non-cooperation poses a big risk for the Court and threatens its effectiveness. Addressing instances of non-cooperation (through the new draft Assembly procedures on non-cooperation) should remain a priority for the Assembly. The Assembly's role depends on the Court's role, as it is only the latter which has the competence to address legal issues that might be raised by non-cooperating States parties.

- The relationship between the African Union and the Court is slowly evolving, in particular in light of the events of the Arab Spring, and needs to be developed further. Despite the various African Union decisions regarding the Court, cooperation with African States has been forthcoming. At the same time, some African countries continue to resent what they perceive as selectivity as well as the Security Council's inaction following various article 16 requests.

Suggested actions for States parties:

22. Establish a peer review mechanism to assess implementing legislation and the general level of cooperation as reported by States parties themselves (c.f. Organization for the Prohibition of Chemical Weapons, United Nations Convention against Corruption review processes), bearing in mind the need to respect the judicial prerogatives of the Court in the areas of cooperation and non-cooperation.

23. Elaborate guidelines on limiting contacts with persons indicted by the Court with a view to delegitimizing such persons (see, for example, similar guidelines by the Office of the Prosecutor and the United Nations Secretariat) and contribute to the marginalization of fugitives in bilateral and multilateral contacts.

24. Make "Implementation and cooperation" a standing agenda item of the Assembly that is regularly discussed.

25. Consider establishing a working group on implementation and cooperation, focused on sharing experiences.

26. Formally adopt the procedures on non-cooperation agreed to by the Bureau.

27. Improve and streamline political and diplomatic support for the Court, including by prioritizing international criminal justice topics within foreign ministries and ministries of justice (where appropriate, the Court's issues should be

among the top three speaking points at ministers' meetings). Respond more forcefully and systematically when situations arise that undermine the Court, such as visits of indicted persons to States parties, or inappropriate contacts by United Nations officials.

28. Systematically use all relevant forums to support the Court, in particular in the context of relevant thematic work of the Security Council or the General Assembly or in the context of regional organizations; consider tracking such interventions to encourage them even further.

29. Promote the adoption of implementing legislation on cooperation with the Court, thereby giving domestic judicial authorities a greater role in cooperation and thus ultimately depoliticizing the execution of arrest warrants.

30. Consider concluding voluntary cooperation agreements with the Court, including on relocation of witnesses and provisional release.

31. Improve relations with the African Union, in particular at the political level, capitalizing on recent events and strengthening the voice of the Court's supporters in Africa.

32. Consider convening Court-specific expert meetings within regional organizations, following the example of the Court-related meetings of the Working Party on Public International Law in the European Union.

33. Use the General Assembly's 2012 high-level meeting on the rule of law to promote the Court, bearing in mind the tenth anniversary of the entry into force of the Rome Statute.

The Court in the international system

The following were the main points raised in the discussion on the status and role of the Court in the international system:

- The Court is an instrument of justice for international crimes as a last resort and a symbol of the rule of law. It must be carefully examined whether it has lived up to its functions and whether it has been able to avoid any bias.
- Possible criteria for Security Council referrals could be: (1) credible evidence of Rome Statute crimes having been committed; (2) likelihood of unwillingness or inability to provide justice at the domestic level or regional level (including hybrid courts); (3) existence of a threat to international peace and security. A formal recognition of such criteria may advance the predictability of Security Council decisions. Prior to such decisions, an independent impartial assessment would be advisable.
- The question of the financing of investigations arising from Security Council referrals needs to be addressed, as the current situation is not in line with the Rome Statute and the relationship agreement.
- The reduction in the number of Security Council members who are also parties to the Rome Statute expected for 2012 (from 10 to 6 or 7) might have a negative impact on the Security Council's willingness to support the Court with the existing referrals. The Council is already barely following up (with the exception of the June 2008 presidential statement on the Sudan).

- Greater clarity is also needed on the criteria for article 16 deferrals.
- The community of those familiar with and supporting the Court is only a small part of a wider community. Outside this circle, misunderstandings about the Court but also substantive disagreements with the views of the Court community exist and need to be addressed, e.g. with respect to peace and justice. Misunderstandings could be addressed to some extent by mainstreaming the Court in international organizations, for which mainstreaming in national administrations is a prerequisite. The Assembly of States Parties could serve as a forum for discourse with others, e.g. by inviting high-level speakers from relevant parts of the United Nations system.
- Expectations need to be managed, in particular regarding the impact of the Court in ongoing conflicts and regarding its deterrent effect. Empirical evidence regarding the latter remains scarce (see, however, the recent study entitled "The Justice Cascade", by Kathryn Sikkink). At the same time, conventional peace talks without justice components have a high failure rate. In some cases, Court investigations have triggered negotiations. The Court has also had positive effects in other areas (e.g. the demobilization of thousands of child soldiers in Nepal, which can be partially credited to the effects of the Lubanga trial).
- States parties were reluctant to add the peace and justice debate to the Kampala Conference, though in the end it was an extremely useful panel. The discussion of this topic is crucial, as conventional wisdom on this issue has not yet been appropriately challenged.
- Complementarity is a core responsibility of States and crucial for the Court's long-term success, though it must be acknowledged that the Assembly of States Parties is not a development agency. The development community is increasingly picking up the justice dimension, as evidenced by the 2011 *World Development Report*.

Suggested actions for States parties:

34. Ensure that cooperation requests are formulated in such a way that they take into account national procedures, requirements and capabilities.

35. Engage in a discussion on the relationship between the Court and the Security Council, with a special focus on referrals of the Council to the Court. To this effect, a checklist of factors to be taken into account in relevant decision-making processes could be useful.

36. Encourage empirical research on the effects of the Court's investigations, in particular the deterrent effect.

37. Mainstream Court-related matters across all relevant branches of their national administration, thereby assisting the mainstreaming of Court-related matters at the international level.

38. Redouble efforts on promoting capacity-building of domestic judiciaries with a view to strengthening the principle of complementarity, including in the context of the Assembly (e.g. by holding a thematic debate on complementarity instead of the general debate; "complementarity" as standing agenda item); capitalize on the

recent *World Development Report*, which links transitional justice to security and development.

39. More strongly involve and sensitize the development community, within and outside the United Nations system (e.g. World Bank, United Nations Development Programme, Organization for Economic Cooperation and Development).

40. Continue the discussions on the compatibility of peace and justice, beginning in more informal frameworks.

Suggested actions for the Court:

41. Improve the provision of information about the Court for outside actors, including by making its website more informative and user-friendly and by providing more targeted information (e.g. fact sheets for conflict mediators, fact-finding commissions, etc.).

Suggested actions for the Security Council:

42. Consider the adoption of general criteria for referrals and deferrals in order to enhance the perception of consistent and predictable decision-making.

43. Follow up on referral decisions through appropriate action to promote cooperation with the Court and enforcement of arrest warrants.

Universality

The following were the main points raised in the discussion on the promotion of universal ratification of the Rome Statute:

- The number of States parties has increased more or less steadily since 2002 (then 60 States parties; 100 in 2005; 114 in 2010; 119 in October 2011). Nine States have joined in the last two years. Asia remains the region with the weakest presence, with only 17 parties out of 49 States. The progress is in good part due to the broad efforts by the Court itself (in particular the Presidency), the President of the Assembly of States Parties, regional organizations (European Union, Commonwealth, Organization of American States, International Organization of la Francophonie) and civil society (Coalition for the International Criminal Court, Parliamentarians for Global Action). Unexpected events of the recent past (Arab Spring) have also been helpful. The effectiveness of these efforts needs to be increased through better coordination and through better access to information about each situation. The new full-time Presidency of the Assembly of States Parties will also have a positive effect in this regard.

- Some 74 countries remain outside the Rome Statute system, which is a rather large number. The 2006 plan of action for achieving universality and full implementation of the Rome Statute received rather limited follow-up within the Assembly of States Parties.

- Raising awareness of the Rome Statute system has some effect, but in a number of countries there exist persistent obstacles and objections rather than misunderstandings. The ratification drive should focus on a persuasive political message, including the protection emanating from the Rome Statute system for a country's civilians and territory. At the same time, no false

expectations must be raised (e.g. regarding non-retroactivity and the scope of the core crimes). The decision of persistent objectors should be respected, but nevertheless they should be engaged in a dialogue.

- Some States have real capacity problems that make ratification (and implementation) difficult. The Assembly of States Parties has no resources to assist in this regard, in contrast, for example, to the Organization for the Prohibition of Chemical Weapons, which has an entire unit to promote ratification. Information materials in the language of target countries would be particularly useful.

Suggested actions for the Court, States parties and civil society:

44. Devise a comprehensive strategy for pursuing universality, with a stronger role for the Assembly, clear priorities and a dynamic and contextual approach that allows for reaction to current political developments, highlighting in particular the benefits of membership (such as prevention, protection of territory, solidarity with victims).

45. Clarify the respective role of different actors such as Court officials, the President of the Assembly, regional organizations, Parliamentarians for Global Action and the Coalition for the International Criminal Court and increase coordination between them, including through a central clearing house for exchange of information led jointly by the Presidencies of the Assembly and the Court.

46. Create a joint database on universality, containing up-to-date information on the status of discussions within each country.

47. Consistently raise the ratification of the Rome Statute (and its amendments) in relevant bilateral contacts.

48. Analyse obstacles for ratification and how to overcome them, in particular with the support of domestic stakeholders, bearing in mind the need to distinguish lack of political will from lack of technical capacity.

49. Produce publications in the language of target countries (in particular Arabic, Spanish, Russian, Portuguese).

50. Continue the dialogue with all States not parties, including and in particular those that have expressed strong reservations about the Rome Statute system.

51. Consider the appointment of goodwill ambassadors or special envoys for the purpose of promoting universality.

Suggested action for the Secretary-General of the United Nations:

52. Consider establishing a focal point for Rome Statute universality at the United Nations (e.g. the Office of the High Commissioner for Human Rights).

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